AN ACTION IS NOT COMMENCED UNLESS THE PETITION IS FILED IN A COURT HAVING JURISDICTION OF THE SUBJECT MATTER

Wasyk v. Trent
87 Ohio L. Abs. 323, 179 N.E.2d 163 (C.P. 1961)
(Affirmed by Court of Appeals; motion to certify granted.)

Plaintiff, an Ohio citizen, and defendant, a West Virginia citizen, were involved in an automobile collision in Montgomery County, Ohio, on August 4, 1956. Twenty-five days after the collision, defendant became domiciled in Ohio. Plaintiff filed a complaint against defendant in the United States District Court on July 30, 1957, alleging diversity of citizenship as a basis of jurisdiction. Service of summons was made on defendant under the Ohio nonresident motorist statute.[1] Summons was delivered by registered mail to defendant in Ohio. Defendant appeared by counsel and apparently moved to make definite and certain and to strike certain allegations, but did not raise the defense of insufficiency of service of process or of lack of jurisdiction of the person. By failing to include these

[1] Ohio Rev. Code § 2703.20 (1953):

> Any non-resident of this state, being the operator or owner of any motor vehicle, who accepts the privilege extended by the laws of this state to non-resident operators and owners, of operating a motor vehicle or of having the same operated, within this state, or any resident of this state, being the licensed operator or owner of any motor vehicle under the laws of the state, who subsequently becomes a non-resident or conceals his whereabouts, . . . makes the secretary of state of the state of Ohio his agent for the service of process in any civil suit or proceeding instituted in the courts of this state against such operator, or owner of such motor vehicle, arising out of, or by reason of, any accident or collision occurring within this state in which such motor vehicle is involved. Such process shall be served . . . upon the secretary of state by leaving at the office of the secretary of state . . . a true and attested copy thereof, and by sending to the defendant, by registered mail, postage prepaid, a like true and attested copy, with an endorsement thereon of the service upon said secretary of state, addressed to such defendant at his last known address. The registered mail return receipt of such defendant shall be attached to and made a part of the return of service of such process.

Fed. R. Civ. P. 4(d)(1):

> . . . Service shall be made . . . upon an individual . . . by delivering a copy of the summons and of the complaint to him personally . . . or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Fed. R. Civ. P. 4(d)(7):

> . . . [I]t is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

defenses, defendant presumably waived them. Over a year later, defendant moved to dismiss on the ground of absence of diversity of citizenship. The United States District Court sustained the motion and dismissed the action on June 30, 1959. Plaintiff filed a petition in the instant case in the common pleas court of Montgomery County on October 13, 1959, and personal service was made on defendant on October 16, 1959. The common pleas court sustained defendant's motion for summary judgment, and held that the cause of action was barred by the two-year statute of limitations[2] since no action had been commenced in the United States District Court within the meaning of the saving statute.[3]

The court held that an action is not "commenced or attempted to be commenced" unless the petition is filed in the office of the clerk of the *proper* court[4] and a summons is issued thereon according to Ohio Revised Code section 2305.17.[5] The court relied upon two decisions of the Supreme Court of Ohio. In *Kossuth v. Bear*,[6] plaintiff's cause of action arose from an automobile accident. Plaintiff first filed a petition in Cuyahoga County where the defendant resided, but service of summons was not made. Plaintiff then filed a petition in Lorain County where the accident occurred, but no service was made in that county. After the statute of limitations had run, the Lorain County action was dismissed by the court without prejudice. Within one year an amended petition was filed in Cuyahoga County, and service was made under Ohio Revised Code section 2703.20. The Ohio Supreme Court held the saving statute not applicable because no case ever came into existence in Lorain County which could be dismissed.

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[2] Ohio Rev. Code § 2305.10 (1953): "An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose."

[3] Ohio Rev. Code § 2305.19 (1953):

> In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date. . . .

[4] Ohio Rev. Code § 2703.01 (1953): "A civil action must be commenced by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon."

[5] Ohio Rev. Code § 2305.17 (1953):

> An action is commenced within the meaning of sections 2305.03 to 2305.22 inclusive, and section 1307.08 of the Revised Code, as to each defendant, at the date of the summons which is served on him or on a co-defendant who is a joint contractor, or otherwise united in interest with him. When service by publication is proper, the action is commenced at the date of the first publication, if it is regularly made.
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> Within the meaning of such sections, an attempt to commence an action is equivalent to its commencement, when the party diligently endeavors to procure a service, if such attempt is followed by service within sixty days.

[6] 161 Ohio St. 378, 119 N.E.2d 285 (1954).

Clearly there was no commencement of an action under Ohio Revised Code section 2305.17 since there was no service of summons, but the supreme court went on to say that there was no action "attempted to be commenced." The court applied the statutory definition of "attempt to commence" as contained in Ohio Revised Code section 2305.17—namely, an endeavor to procure service followed by service within sixty days—to the phrase "attempted to be commenced" as contained in the saving statute, Ohio Revised Code section 2305.19.[7] In *Hoehn v. Empire Steel Company*,[8] an action for personal injuries commenced in Cuyahoga County, defendant corporation was not properly served and therefore the court acquired no jurisdiction over its person.[9] Within one year after the case was dismissed for want of service, but after the statute of limitations had run, plaintiff brought another action in Richland County, and proper service was made. In a per curiam opinion, the Ohio Supreme Court held that a civil action must be commenced by filing a petition with the clerk of the *proper* court and causing a summons to be issued and served.[10] Since the court in which the first action was brought had no jurisdiction over the person of defendant, the supreme court held it could not be the proper court, and therefore, an action had not been commenced.

In the instant case plaintiff relied upon *Pittsburgh, Cincinnati, Chicago, and St. Louis Railway Company v. Bemis*,[11] which was the leading case on the saving statute decided prior to *Kossuth* and *Hoehn*. In the *Bemis* case plaintiff, an Ohio corporation, sued defendants, an Ohio corporation and a New York corporation, in federal court. Since diversity of citizenship was lacking, the case was dismissed for lack of jurisdiction of the subject matter. Plaintiff then brought an action in the Superior Court of Cincinnati after the statute of limitations had run on the cause of action but within one year of the dismissal by the federal court. The Ohio Supreme Court held that the proceeding in the federal court was a commencement, and that plaintiff failed otherwise than upon the merits in federal court. The

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[7] See Eastman and Kane, "Commencement of a Civil Action in Ohio for Application of the Statute of Limitations," 16 Ohio St. L.J. 140, 152 (1955):

> . . . [I]f there has been an "attempt" followed by service within sixty days, the action is "commenced" under Section 2305.17, and there is no need in Section 2305.19 for any reference to an action "attempted to be commenced." It might be assumed that the phrase was included in Section 2309.19 to cover some situation other than an action commenced under Section 2305.17. At first glance at least, it would seem that *Kossuth v. Bear* strikes out of the saving clause for failure otherwise than on the merits the provision for actions "attempted to be commenced." It may be that the supreme court sees some difference between the case in which the defendant has been served with defective summons and the case in which the defendant is not found at all, and would hold that the first instance constituted an attempt to commence.

[8] 172 Ohio St. 285, 175 N.E.2d 172 (1961).

[9] Ohio Rev. Code § 2307.36 (1953).

[10] Ohio Rev. Code § 2703.01 (1953).

[11] 64 Ohio St. 26, 59 N.E. 745 (1901).

court rejected the narrow definition of "attempt to commence" which was later presented in *Kossuth* and stated that the jurisdiction of the court does not determine what is, and what is not, an action. The court said:

> It is not reasonable we think, to conclude that the legislature intended, by the section in question, to favor suitors who had failed in a former suit because of the lack of jurisdiction of the parties, or because a jurisdictional fact, though existent, had not been stated, and deny like favor to suitors who had happened to fail because the court in which their attempt had been made was without jurisdiction of the action on the facts as they actually existed. If such distinction was intended, we utterly fail to see any principle on which it could find support. On the other hand, it seems quite apparent that the intention was to secure that class of suitors from loss, who, without laches or fault, but from causes incident to the administration of the law, are compelled to abandon a present action without a determination of its merits, and give to such, without distinction, an opportunity, in reasonable time within the statute, to renew such action.[12]

The only case to reach the United States Supreme Court[13] on the issue of whether a dismissal of a suit for want of jurisdiction of the subject matter concludes the right of action, involved a construction of the Tennessee saving statute.[14] The circuit court had dismissed the case because the jurisdictional fact, although existing, had not been pleaded. A second suit was begun after the statute of limitations had run. The Supreme Court held that the second suit was within the saving statute since the first suit was dismissed for a defect in pleading, and because plaintiffs were not guilty of such negligence or carelessness in the bringing of the first suit as should exclude them from the benefit of the statute. The Court stated that there might be cases where the lack of jurisdiction in the court was so clear that the bringing of a suit would amount to such negligence that the plaintiff should not have the benefit of the saving statute. The Tennessee Supreme Court later held in *Sweet v. Chattanooga Electric Light Company*[15] that an action cannot be commenced in a court which does not have jurisdiction because the whole proceeding is void, and the effect is the same as though no suit had been brought. Dissatisfaction with the decision

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[12] *Id.* at 38, 59 N.E. at 748.

[13] Smith v. McNeal, 109 U.S. 426 (1883).

[14] Section 2755 of the Tennessee Code of 1858 is substantially the same as the current section, Tenn. Code Ann. § 28-106 (1955):

> If the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time, commence a new action within one year after the reversal or arrest.

[15] 97 Tenn. 252, 36 S.W. 1090 (1896).

in *Sweet* was indicated by the decisions which followed.[16] Finally, the Tennessee Supreme Court expressly overruled *Sweet* and held that the saving statute applied even if the action were commenced originally in a court that had no jurisdiction, unless the plaintiff was grossly negligent in choosing the forum of his first suit.[17]

As a general rule, other jurisdictions with a similar saving statute agree with *Bemis* and hold that the dismissal of a former suit for want of jurisdiction of the subject matter does not constitute a bar to another action unless laches or bad faith exists even though the general statute of limitations bars plaintiff's action. Since questions of jurisdiction may be difficult to determine, there should not be a distinction between the consequences of error made by the plaintiff in good faith with respect to the jurisdiction of the court and the results of a non-jurisdictional error which leads to a dismissal which is not on the merits.[18] Although the court will be called upon to make a fact determination as to the good faith of the plaintiff in choosing the forum if the *Bemis* approach is taken, it would seem that the results reached under this procedure would be more equitable than the results to which the rule of the instant case may lead.[19]

In both *Kossuth* and *Hoehn,* service was not obtained within the period of the statute of limitations, or within the additional sixty-day period established by Ohio Revised Code section 2305.19. The court was understandably unwilling to permit the saving statute to be used to extend by many months the time within which service must be made upon the defendant. No question of jurisdiction of the subject matter was involved in either case. Therefore, the reference to the "proper court" in *Hoehn* should be understood as referring only to a court which had obtained

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[16] See, *e.g.*, LaFollette Coal, Iron and Ry. Co. v. Minton, 117 Tenn. 415, 101 S.W. 178 (1907), which indicated that *Sweet* should be confined to its particular facts. In Swift and Company v. Memphis Cold Storage Warehouse Co., 128 Tenn. 82, 158 S.W. 480 (1913), the court enjoined defendant from relying on a plea of the statute of limitations if a suit was thereafter seasonably brought in a proper law court on the same cause of action. In Davis v. Parks, 151 Tenn. 321, 270 S.W. 444 (1924), the court held that if plaintiff was grossly negligent in choosing the forum of the first suit, then *Sweet* was correctly decided, but a dismissal for want of jurisdiction under any circumstances is too broad.

[17] Burns v. People's Telephone and Telegraph Co., 161 Tenn. 382, 33 S.W.2d 76 (1930).

[18] Gaines v. City of New York, 215 N.Y. 533, 540, 109 N.E. 594, 596 (1915), in an opinion by Cardozo, J.: "A suitor who invokes in good faith the aid of the court of justice and who initiates a proceeding by the service of process must be held to have commenced an action within the meaning of this statute, though he has mistaken his forum . . . . It may be that a different rule should be applied where the earlier action has been brought with knowledge of the lack of jurisdiction and in fraud of the statute."

[19] In the instant case the registered mail return receipt indicated that delivery was made to defendant in West Carrollton, Ohio, thus putting plaintiff on notice of the possibility that no diversity of citizenship existed.

jurisdiction over the person of the defendant by valid service of summons.[20] *Kossuth* and *Hoehn* should not have been interpreted as overruling *Bemis,* and as requiring that the court have jurisdiction of the subject matter. It is submitted that the court in the instant case failed to consider the precise problem before the court in *Kossuth* and *Hoehn,* namely, lack of jurisdiction of the person, and accordingly misinterpreted the language of the court in those cases.

[20] It can be argued that *proper* as used in Ohio Revised Code section 2703.01 is only directory and that this section should be interpreted to mean: "A civil action must be commenced by filing in the office of the clerk of the court, *which has been selected by plaintiff to adjudicate his claim,* a petition and causing a summons to be issued thereon."